Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Satellite Home Viewer Improvement Act of 1999	)	CS Docket No. 99-363
	)	
	)	
Retransmission Consent Issues	)	

COMMENTS OF CBS CORPORATION

I. Introduction and Summary.

In the Notice of Proposed Rulemaking ("Notice") in the above proceeding, the Commission seeks comments on a range of questions related to its role in implementing the new compulsory copyright license regime enacted by Congress for the retransmission of local broadcast station signals back into those stations' local television markets. In particular, the Notice requests comments on the provisions of the Satellite Home Viewer Improvement Act ("SHVIA")[1] that it accurately summarizes as "requir[ing] broadcasters, until 2006, to negotiate in good faith with satellite carriers and other MVPDs [multichannel video programming distributors] with respect to their transmission of the broadcasters' signals, and prohibit[ing] broadcasters from entering into exclusive retransmission agreements."[2] In these comments, CBS will focus on this aspect of the new compulsory

[1] Act of Nov.29,1999, PL 106-113, §1000(9), 113 Stat. 1501 (enacting S. 1948, including the Satellite Home Viewer Improvement Act of 1999, Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999.

[2] Notice at ¶1.

license scheme and offer comments as well on other retransmission consent implementation issues raised by the Notice.

CBS actively supported the adoption of this new compulsory copyright license by Congress, as well as the requirement (which Congress decided would take effect after a six-month moratorium) that consent be obtained from a broadcast station as a precondition for retransmission of its signal under that copyright license. CBS believes that the marketplace incentives of direct-to-home satellite service providers and of broadcast stations to reach fair retransmission agreements promptly are strong. However, in order for those incentives to work in the marketplace, the Commission must not adopt an intrusive regulatory scheme that would undermine them by encouraging litigation and regulatory delay, and that would needlessly impose significant costs on both the Commission and the affected parties. As explained more fully below, CBS believes that the Commission can and should avoid such counterproductive over-regulation in this area by proceeding from two fundamental premises.

First, it would be unwise and utterly inconsistent with the plain language of the SHVIA and its legislative history to create a regulatory scheme based on a common carrier or cable model to implement the "good faith" requirement for retransmission consent negotiations contained in Section 1009 of the SHVIA (codified as Section 325(b)(3)(C)(ii) of the Communications Act).[3] The statute does not impose a nondiscrimination standard in any way, shape or form, much less one that is in any way comparable to the traditional regulation of monopolistic or dominant common carriers or to the "program access" rules

[3] PL 106-113, §1009, 113 Stat. 1501, 47 U.S.C § 325(b) (3) (C) (ii).

enacted in the Cable Television Competition and Consumer Protection Act of 1992 (the "1992 Cable Act").[4]

Second, the burden of establishing a lack of good faith on the part of a broadcast station should be a heavy one, and should lie squarely on the satellite carrier. As explained below, the general intent of the Congress was clearly to encourage "marketplace" negotiations and to ban only exclusive contracts and behavior equivalent to a refusal to deal which prevents an MVPD from having the opportunity for a retransmission consent negotiation. There is no indication that Congress intended to invite parties easily to embroil the Commission in a complex adjudication in every instance in which a broadcast station offers retransmission consent terms and conditions that a litigious DTH service provider, for example, might deem to be disadvantageous. Rather, there is every indication that the Congress intended to encourage marketplace negotiations limited only by the well-known -- if intentionally general -- concept of "good faith" negotiation.

In this connection, it is important to emphasize that the SHVIA bans (until 2006) exclusive retransmission consent arrangements. Thus a broadcaster by definition cannot share in the extra value to an MVPD of such exclusive arrangements for six years. Also,

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[4] The Commission unqualifiedly states in the first paragraph of the Notice that "[t]he legislation generally seeks to place satellite carriers on an equal footing with local cable operators when it comes to the availability of broadcast programming." (Notice, ¶1). That, of course, is true with regard to the enactment of a new compulsory copyright license to allow local-to-local satellite retransmissions. However, it is clearly *not* the case that Congress placed a higher value on encouraging competition to cable from DTH providers than on giving broadcasters the same opportunity to reach freely negotiated retransmission agreements with satellite carriers as they have with respect to cable operators. If that had been the objective of Congress, it would have adopted *no* retransmission consent requirement at all with respect to satellite MVPDs, as it was urged to do by EchoStar. *See,* "Ergen Grades Congress D on SHVA," *Multichannel News* ,November 22 1999, p. 3. Instead, Congress required that satellite carriers obtain retransmission consent (after a six month moratorium) for local-to-local transmissions of television signals, enacted stringent penalties for any DBS system which carried a local television station without such consent, and did not include a lack of "good faith" negotiation among the "exclusive defenses" available to a DTH carrier in any complaint proceeding for the unauthorized carriage of broadcast signals. *See,* Act of Nov.29,1999, PL 106-113, § 1009. This legislative scheme contrasts sharply with the provisions of the 1992 Cable Act, which expressly prohibit any price or other "discrimination" by vertically integrated satellite cable programming vendors in selling their product to non-affiliated MVPDs, including satellite carriers. 47 U.S.C. § 548.

broadcast stations and networks, as the only video advertising media in their respective local and national markets that are almost universally available, have a strong commercial interest in maintaining this unique ubiquity. Under these circumstances, broadcasters have a powerful marketplace incentive to reach retransmission consent agreements with all MVPDs, including satellite carriers. Indeed, this fact is underlined by the retransmission agreements already reached between three of the four major networks and DirecTV.[5]

Given the strong incentive of both television broadcasters and MVPDs to reach agreement on retransmission terms, there is no reason to believe that detailed government oversight of retransmission negotiations will be necessary.[6] By the same token, broadcasters' fundamental economic interest in maximizing the audience for their programming makes it virtually certain that intrusive government regulation of marketplace retransmission negotiations -- with all of its attendant costs -- would only rarely result in increased access to broadcast programming for satellite subscribers.[7] Accordingly, the evidentiary burden on a complainant seeking such government intervention should be very high. In that regard, CBS urges that the Commission not involve itself in any way in the substance of a retransmission

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[5] *See,* "DirecTV Reaches Agreement with NBC for Retransmission of Network-Owned Stations," http://www.directv.com/press/ pressdel/0,1112,252,00.html. CBS, the only network which has yet to conclude a final agreement with DirecTV, is engaged in active discussions with that company.

[6] From December 31, 1997 through October 1998, the number of satellite subscribers increased by almost 44 percent to a total of 12,247,136 -- approximately 12 percent of all U.S. television households. *See, 1997 Net Monthly Satellite Subscriber Additions,* http://www.satbiznew.com/monthly.html and *U.S. DTH Subscribers, October 1998-October 1999,* http://www.skyreport.com/dth_us.htm . It strains credulity to suggest that any television station would abandon an audience of this size -- or any meaningful portion of it -- to its local market competitors by conduct tantamount to a refusal to deal with DTH providers.

[7] It is perhaps worth noting in this context that, since MVPDs became subject to a retransmission consent requirement with the passage of the 1992 Cable Act, broadcast programming has become unavailable to cable subscribers because of an impasse in retransmission negotiations in only a handful of instances, and then only for a matter of days. *See, e.g.,* "Retrans End-Around Averted," *Multichannel News Online, January 10, 2000,* http://www.multichannel.com/1.shtml. Moreover, hundreds of small cable operators have had no more difficulty in successfully concluding retransmission agreements than the largest MSOs, and there is no evidence whatever that these small operators have had more onerous terms imposed on them than on the giants of the cable industry.

negotiation unless a complaint of lack of "good faith" demonstrates on its face that a retransmission consent offer is so commercially indefensible as to amount to a refusal to deal.

II. The Congress Explicitly Considered And Rejected The Notion That Broadcaster/MVPD Retransmission Consent Negotiations Under The SHVIA Should Be Subject To A "Nondiscrimination" Test.

Any assessment of the intent of Congress in enacting the "good faith" negotiation requirement of the SHVIA must begin by comparing that provision with the stringent non-discrimination requirements imposed by the 1992 Cable Act on programming vendors vertically integrated with cable system operators, with respect to their sale of satellite delivered cable programming to MVPDs. The latter statute expressly prohibits:

> discrimination by a satellite cable programming vendor in which a cable operator has an attributable interest ... in the prices, terms, and conditions of sale or delivery of satellite cable programming ... among or between cable systems, cable operators, or other multichannel video programming distributors, or their agents or buying groups ... .[8]

In stark contrast, the relevant provision of the SHVIA[9] contains *no* inhibition on the negotiation of retransmission consent agreements with different MVPDs that contain "different terms and conditions, including price terms." Indeed, the statute -- the only substantive requirement of which is "good faith negotiation" -- expressly includes a mandate

[8] 47 U.S.C. §548 (c) (2) (B).

[9] 47 U.S.C. §325(b)(3)(C)(iii); *see also* Joint Explanatory Statement of the Committee on Conference on H.R. 1554, Intellectual Property and Communications Omnibus Reform Act of 1999 ("Conference Report"), 145 Cong. Rec. H11769 (daily ed. Nov. 9, 1999).

to the Commission that it *cannot* find a lack of "good faith" if different terms and conditions in different retransmission consent agreements are based on "competitive marketplace considerations." We discuss below the appropriate meaning to be given to the phrase "competitive marketplace considerations." The fundamental point that needs to be stressed at the outset, however, is that "nondiscrimination" has been considered by the Congress and explicitly rejected as a test to be applied by the Commission to retransmission consent agreements with MVPDs. The concept of non-discrimination, therefore, is without relevance in interpreting the phrase "competitive marketplace considerations."

The House of Representatives originally adopted a version of satellite retransmission consent language that contained a ban on "discriminatory practices, understandings, arrangements and activities, including exclusive contracts for carriage, that prevent a multichannel video program distributor from obtaining retransmission consent from such stations."[10] Even under this provision "discrimination" in terms and conditions could have been proscribed by the Commission only if it "prevented" a retransmission consent agreement. However, it is significant that, in a bipartisan colloquy on the House floor at the time of the passage of the House bill, the Chairman of the Subcommittee on Telecommunications, Trade and Consumer Protection, Rep. Billy Tauzin (R-LA) and the ranking member of the House Committee on Commerce, Rep. John Dingell (D-MI), made clear that the provision was intended to "prevent exclusive contracts between a broadcast station and any particular distributor" and "to prevent refusals by a station to deal with any particular distributor." On the other hand, "a station's insistence on different terms and

[10] Satellite Copyright, Competition and Consumer Protection Act of 1999, Section 102, reprinted at 145 Cong. Rec. H2312 (daily ed. April 27, 1999).

conditions in retransmission agreements based on marketplace considerations [was] not intended to be prohibited... ."[11]

The SHVIA as finally passed after consideration by a Conference Committee contains no reference to "discriminatory practices;" indeed, unlike the original House bill, the plain language of the Act expressly envisions "retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors... ." [12] It is clear, then, that Congress did not intend to preclude "discriminatory" (i.e., different) terms and conditions in different retransmission consent agreements. CBS strongly believes that a different standard -- one which would have required the Commission to fashion a pervasive regulatory scheme governing the negotiation of retransmission consent agreements -- would have been both unnecessary and unwise in light of the marketplace incentives for the successful conclusion of such agreements. What is decisive in this proceeding, however, is that the Congress has already, and indisputably, rejected this course.

III. Consistent With Congressional Intent, The Commission Must Apply The Concepts Of "Good Faith Negotiation" And "Competitive Marketplace Considerations" In A Manner Which Does Not Dictate The Substantive Terms of Retransmission Consent Agreements.

As shown above, although Congress left the term "good faith negotiation" undefined in the statute, it is eminently clear what was *not* intended -- a detailed, case-by-case review of the retransmission terms offered to one MVPD as compared to another. Thus, the answer to the question posed by the Notice as to the "relevance"of the nondiscrimination standards of both the program access and open video system rules to what constitutes a "competitive

[11] 145 Cong. Rec. H2320 (daily ed. April 27, 1999) ("House Colloquy").

[12] 47 U.S.C. § 325 (b) (3)(C) (ii).

marketplace consideration" for purposes of Section 325(b)[13] is simply that those rules have no application in the latter context. Indeed, "nondiscrimination standards" along the lines of the program access rules -- and the complex and protracted litigation as to the fairness of business terms and practices which such rules inevitably entail[14] -- are the epitome of the kind of intrusive regulation clearly rejected by the plain language of the SHVIA and its legislative history.[15]

Thus the program access and open video system rules are based -- rightly or wrongly -- on a presumption of market failure that Congress did not find to be present with respect to retransmission consent. For example, the concern animating the adoption of the program access rules -- and the enabling provisions of the 1992 Cable Act -- was that programming vendors, vertically integrated with cable system owners, would discriminate against non-affiliated multichannel providers in affording access to popular programming in order to stifle competition in the MVPD industry.[16] Such vertically integrated cable

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[13] Notice at ¶19

[14] *See, e.g., In the Matter of DirecTV, Inc., v. Comcast Corporation,* 13 FCC Rcd 21822 (1998); *In the Matter of Turner Vision, Inc. v. Cable News Network, Inc.*, 13 FCC Rcd 12610 (1998); *In the Matter of Corporate Media Partners v. Rainbow Program Holdings, Inc.,* 12 FCC Rcd 15209 (CSB 1997); *In the Matter of Bell Atlantic Video Services Company v.Rainbow Program Holdings, Inc.,* 12 FCC Rcd 9892 (CSB 1997); *In the Matter of CellularVision of New York, L.P. v. Sports Channel Associates,* 11 FCC Rcd 3001 (CSB 1996).

[15] The Notice recognizes that common carrier "nondiscrimination" regulation under Section 252(I) of the Communications Act may be of little relevance here because it is based on the principle that a local exchange carrier must literally provide elements of its service under the same terms and conditions to all carriers. Notice, fn. 40. CBS agrees.

[16] Thus, the Report of the Senate Commerce Committee, in commenting on the Senate version of the bill which eventually became the 1992 Cable Act, explained the program access provision as follows:

> To encourage competition to cable, the bill bars vertically integrated, national and regional cable programmers from unreasonably refusing to deal with any multichannel video distributor or from discriminating in the price, terms, and conditions in the sale of programming. ... *This provision is limited to vertically integrated companies because the incentive to favor cable over other technologies is most evident with them.*

systems, the Congress feared, would have little incentive to make their owned programming available to potential competitors on reasonable terms.[17] Because of consumer expectations regarding the availability of such programming, withholding access had the potential of nipping possible competition by alternative multichannel providers in the bud.

By way of contrast, the Congress did not -- and the Commission has repeatedly refused to -- extend these rules to *non*-vertically integrated cable programmers,[18] consistent with the common sense realization that the interests of such programmers would be served solely by maximizing the profitability of their programming. Any "discrimination" in terms and conditions offered to different MVPDs could thus safely be presumed to be based on "competitive marketplace considerations" -- for instance, the extent of distribution which could be offered by a very large MVPD owner -- rather than anti-competitive animus.

The incentives motivating broadcasters in seeking to negotiate retransmission agreements with MVPDs are analogous to those of non-vertically integrated cable programmers seeking the widest possible distribution of their product. On the other hand, the motivations of a programmer whose goal is to maximize distribution are completely unlike those of (1) vertically integrated cable system owners who may have incentives to diminish, rather than enhance, competition in the multichannel distribution market, (2)open

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Senate Report 102-92, 102nd Cong., 2d Sess., 1992 U.S. Code Cong. and Adm. News at 1133, 1161 (emphasis added). *See also* House Conference Report No. 102-862, 102nd Cong., 2d Sess., 1992 U.S. Code Cong. and Adm. News at 1231, 1274 (emphasis added).

[17] Id.

[18] *In the Matter of Annual Assessment of the Status of Competition in the Video Marketplace, Third Annual Report*, 12 FCC Rcd 4358, 4436 (1997) ; *Second Annual Report*, 11 FCC Rcd 2060, 2139 (1995)

video system owners whose unregulated interests would lie in denying channel capacity to competitive MVPDs, and (3) Local Exchange Carriers ("LECs") to whom the negotiation of interconnection agreements with potential competitors necessarily implies the end to their monopoly over local residential telephone service. Therefore, while intrusive government supervision of marketplace negotiations in those areas has been found by Congress to be justified on the ground that a market failure would otherwise be likely to develop, it has no place -- as Congress expressly recognized -- with respect to the negotiation of retransmission agreements between broadcasters and MVPDs, where the interests of both parties are clearly served by the conclusion of an agreement.

A more apt analogy for purposes of determining what constitutes "good faith" negotiation for purposes of the SHVIA may be found in the area of labor law. Not unlike a broadcaster and an MPVD seeking to agree on terms for the carriage of a television station's signal, both parties in a labor negotiation have an incentive to reach an agreement to avoid a work stoppage which would be harmful to both. It is not surprising, therefore, that the "good faith negotiation" requirements of the SHVIA and the Labor Management Relations Act ("LMRA") are very similarly structured.

Under the LMRA, it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees."[19] The Act defines a refusal to engage in collective bargaining as follows:

> For purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, ... *but such obligation does not compel either party to agree to a proposal or require the making of a concession.*[20]

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[19] 29 U.S.C. §158

[20] 29 U.S.C § 158 (d) (emphasis added)

The legislative histories of the LMRA and the SHVIA are also remarkably similar. Thus, in discussing the SHIVA, Reps. Tauzin and Dingell recognized that the statute's requirement of good faith bargaining as to retransmission consent was intended to "prevent exclusive retransmission arrangements between a broadcast station and a particular distributor" and "to prevent refusals by a station to deal with any particular distributor." At the same time, however, they emphasized that "a station's insistence on different terms and conditions in retransmission agreements based on marketplace considerations [was] not intended to be prohibited."[21] In a like vein, the Senate Committee on Education and Labor, in commenting on what ultimately became Section 8(d) of the National Labor Relations Act ("NLRA")[22], stated:

> The committee wishes to dispel any possible false impression that this bill is designed to compel the making of agreements or to permit governmental supervision of their terms. It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement, because the essence of collective bargaining is that either party shall be free to decide whether the proposals made to it are satisfactory.[23]

In enacting the LMRA twelve years later, Congress found that, despite this and similar statements in the legislative history of the NLRA, the National Labor Relations Board had "gone very far, in the guise of determining whether employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make."[24] Congress therefore made its intent even clearer by amending Section 8 of the National Labor Relations

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[21] House Colloquy, *supra.*

[22] The National Labor Relations Act was the predecessor statute to the LMRA.

[23] S.Rep.No.573, 74th Cong., 1st Sess., 12 (1935)

[24] H.R.Rep. No. 245, 80th Cong., 1st Sess., 19-20 (1947).

Act to specify that the obligation "to bargain collectively ... in good faith" did not require any party to "to agree to a proposal or require the making of a concession."

Moreover, the courts have uniformly interpreted Section 8(d) of the Labor Management Relations Act as being concerned with the process by which collective bargaining negotiations are conducted, rather than with the substantive outcome of those negotiations, or even whether any agreement at all is reached. Thus the Supreme Court has found it "clear that the [National Labor Relations] Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements."[25] In so doing, the Court has observed that

> [T]he Act does not contemplate that unions will always be secure and able to achieve agreement even when their economic position is weak, or that strikes and lockouts will never result from a bargaining impasse. It cannot be said that the Act forbids an employer or a union to rely ultimately on its economic strength to secure what it cannot obtain from bargaining.[26]

The same may be said of the "good faith negotiation" provision of the SHVIA. Indeed, the Court's analysis should be dispositive of any notion that the Commission ought to use Section 325(b) as a means of redressing disparities in the economic strength which various MVPDs will bring to the retransmission bargaining table.

None of this is to say, of course, that the requirement of good faith negotiation under either the National Labor Relations Act or the SHVIA is meaningless.[27] However, we

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[25] *National Labor Relations Board v. American Labor Insurance Co.*, 343 U.S. 395, 404 (1952) (duty to bargain collectively could not be enforced by prohibiting employer from holding firm to its demand for a "management functions" clause as a counterproposal to a union's demand for an unlimited arbitration provision).

[26] *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 109 (1970). The Court also stated that, "while the Board does have power under the National Labor Relations Act ... to require employers and employees to negotiate, it is without power to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement." Id. at 102.

[27] The NLRB has, for example, regularly found employers to be in violation of their obligation to bargain collectively in good faith for a variety of reasons, including an employer's implementation of unilateral

emphasize again that, absent a persuasive showing on the face of a complaint that a retransmission consent offer is so commercially indefensible as to amount to a refusal to deal, the wisdom or fairness of the substantive proposals made by one side or the other should be beyond the scope of the Commission's oversight of retransmission negotiations.

Once more, an example from the field of labor law is instructive. In *H.K. Porter Co. v. NLRB,* the Supreme Court overturned a finding of the National Labor Relations Board, approved by the United States Court of Appeal for the D.C. Circuit, that an employer had breached its duty to engage in good faith collective bargaining by refusing to agree to deduct its employees' union dues from their pay checks. The record showed that the Company already made deductions for taxes, insurance and charitable contributions from those pay checks, that it did not object to the additional deduction of union dues on the ground that it would involve any additional inconvenience, and that the only reason offered by the Company for its unwillingness to agree to the requested checkoff was its refusal "to give the union aid and comfort." On these facts, the Board held that the employer's refusal to agree to the checkoff clause was based on a desire to frustrate agreement and not on any legitimate business reason, and ordered the company to accede to such a provision.

The Supreme Court reversed, holding that "[i]t is implicit in the structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strength of the parties."[28] This is equally true -- and

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changes with respect to matters which are the subject of collective bargaining with the union, refusal to disclose the projected cost of benefits, requiring the submission of all proposals in writing, unwillingness to reduce an agreement to a formal contract, and failure to schedule negotiating sessions in a reasonable and timely manner. *See generally National Labor Relations Board v. Katz*, 369 U.S. 736 (1962); *NLRB v. General Electric Co.*, 418 F.2d 736 (2d Cir. 1969)

[28] 397 U.S. at 107-08. We note in passing that, quite properly, neither the Congress nor this Commission took any steps to affect the outcome of retransmission consent negotiations during the period when the monopolistic power of many cable systems within their markets often prevented broadcasters from realizing any significant consideration for the carriage of their signals. It would be ironic indeed were the Commission, now that DTH providers may be expected to provide real competition to cable operators by virtue of the

equally appropriate -- with respect to retransmission agreements between broadcasters and MVPDs. Just as in the labor context, both sides in retransmission negotiations will clearly benefit from reaching an agreement. The only real subject to be discussed, therefore, is how they will divide those benefits between them. That is a question which, in this country, has traditionally been determined by marketplace negotiations rather than by government dictate. As shown above, the Congress clearly opted for free negotiations in the present context.

IV. Other Issues.

While the vital issue in this proceeding is clearly the Commission's interpretation of the requirement that television stations negotiate with MVPDs in "good faith" regarding the carriage of their signals, CBS would offer the following comments on several of the other issues raised in the Notice.

1. Duopoly.

The Notice asks what "impact" the recent change in the local television station ownership rules should have on "a broadcaster's duty to negotiate in good faith."[29] CBS generally urges the Commission not to enter the morass that would result from attempting to generalize in advance about what fact situations would justify its extraordinary intervention in a retransmission consent negotiation. Rather, the heavy burden of establishing a need for such an intervention should rest squarely on the complainant. Certainly there should be no presumption, or even intimation, that television station licensees owning two stations in a

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recently-enacted local-to-local compulsory license, to interpret the SHVIA in such a way as to deprive broadcasters of the new bargaining power which they may realize as a result of increased competition among MVPDs.

[29] Notice at ¶19.

market in full compliance with the Commission's rules could not negotiate retransmission arrangements with MVPDs for both stations jointly.

2. Election Period.

CBS believes it to be obvious that the must carry/retransmission consent election period for satellite carriers must correspond to that for cable systems and other MVPDs. To do otherwise would deprive broadcasters of the enhanced bargaining power which they may enjoy as a result of the increased competition among MPVDs stemming from enactment of the SHVIA.

3. Sunset Provision.

As amended by the SHVIA, Section 325 (b)of the Communications Act directs the Commission to adopt regulations that shall:

> *[U]ntil January 1, 2006*, prohibit a television broadcast station that provides retransmission consent from ... from failing to negotiate in good faith, and it shall not be a failure of good faith if the television broadcast station enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations.[30]

The plain language of the statute makes perfectly clear that it is intended to sunset as of January 1, 2006. The Commission should confirm this fact.

V. Conclusion

As shown by the program access provision included in the 1992 Cable Act, Congress is fully capable of enacting -- when it intends to -- a prohibition against discrimination by the licensor of a program service between different MVPDs with respect to price or other

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[30] 47 U.S.C. § 325(b)(3)(C)(ii) (emphasis added)

terms. Not only the plain language of the statute, but also its legislative history, make clear that Congress has not done so in adopting the "good faith" negotiation provision of the SHVIA. That Congress should have left the negotiation of retransmission agreements to the marketplace, subject only to a broad "good faith" requirement, is not surprising. Unlike the situation with respect to a vertically integrated cable programmer/operator, or an LEC negotiating an interconnection agreement with a potential competitor in the delivery of local residential phone service, television broadcasters have no incentive to frustrate the successful conclusion of a retransmission agreement with a satellite carrier, or any other MVPD. To the contrary, failure to reach such an agreement will have an immediate adverse impact on the station, by reducing its potential audience, as well as on the MVPD, by alienating its subscribers and perhaps causing them to consider other multichannel alternatives. In these circumstances, with the only issue for negotiation being how the mutual benefits of agreement are to be divided between the parties, powerful pressures in the direction of compromise will be exerted by the serious consequences of failing to reach a settlement. This has certainly been the experience in retransmission negotiations between television stations and cable operators, both large and small, since the retransmission consent requirement first became effective in 1993.

In short, it is virtually certain that the parties will ultimately reach a retransmission agreement, even if a brief disruption of service occurs in a handful of cases. The marketplace forces which make this an overwhelming likelihood will, however, be disrupted if the Commission mistakenly gives a broad interpretation to "good faith" and "competitive marketplace considerations." Such an interpretation would only encourage some parties to try their luck at litigation, rather than contend with the realities of the bargaining table. In

the end, of course, a resolution will be achieved, but only after the needless expenditure of significant resources by both the parties and the Commission.

We believe the Commission is entirely capable of distinguishing manifest bad faith, should it occur, from hard but reasonable bargaining. The Commission should encourage all parties to reach prompt and fair agreements through good faith discussions by making clear that it will not intervene in retransmission negotiations absent a complaint which demonstrates, on its face, that a retransmission consent offer is so commercially indefensible as to amount to a refusal to deal.

Respectfully submitted,

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January 12, 2000